STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of AEDAN DENNIS PADGETT, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KODY PADGETT,

Respondent-Appellant.

UNPUBLISHED
February 15, 2007

No. 270617
Otsego Circuit Court
Family Division
LC No. 05-000058-NA

Before: Donofrio, P.J. and Bandstra and Zahra, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to the minor child at the initial dispositional hearing pursuant to MCL 712A.19b(3)(b)(i) and (k)(iii). We affirm.

The trial court assumed jurisdiction over the minor child following a bench trial. Mike Edwards represented both respondent and the minor child's mother, Lynnette Avery, at the adjudicative phase of these proceedings. Initially, respondent and Avery requested a jury trial. However, Edwards faced a potential scheduling conflict and the trial court expressed reluctance to adjourn the trial. Therefore, respondent felt required to choose between consenting to a bench trial to ensure Edwards's continued representation or proceeding with a jury trial, risking that Edwards would become unavailable, leaving respondent to continue with appointed counsel. As a result, respondent waived his request for a jury trial and a bench trial was held.

After the trial court assumed jurisdiction over the minor child, it appointed David Leonardson to represent respondent because of potential conflicts between respondent and Avery at the dispositional phase of the proceedings.[1] Thereafter, Leonardson filed a motion for

[1] The trial court first raised the issue of potential conflict at the preliminary hearing, however, respondent and Avery each waived any potential conflict at that time. The trial court advised both respondent and Avery that if either of them decided that they wanted another attorney, the court would appoint one for them. Edwards continued to represent Avery at the dispositional
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reconsideration, asserting that respondent did not knowingly and understandingly waive his right to a jury trial at the adjudicative stage, due to faulty advice from Edwards. Leonardson requested that the trial court set aside its findings of fact at the adjudicative phase and grant respondent a new jury trial. After conducting an evidentiary hearing, the trial court denied respondent's motion.

Respondent now argues that the trial court erred in failing to set aside his jury waiver. We disagree.[2]

The trial court treated respondent's motion as a motion for a new trial. MCR 3.992 permits a respondent to move for rehearing or a new trial. See also MCL 712A.21(1). This Court reviews a trial court's decision on a request for rehearing or reconsideration for an abuse of discretion. *In re Burns*, 236 Mich App 291, 293; 599 NW2d 783 (1999); *In re Toler*, 193 Mich App 474, 478; 484 NW2d 672 (1992). Because the trial court also conducted an evidentiary hearing on respondent's motion, any findings of fact are reviewed under the clearly erroneous standard. See MCR 2.613(C).

In child protective proceedings, a parent may demand a jury only at the adjudicative phase. *In re PAP*, 247 Mich App 148, 153; 640 NW2d 880 (2001). There is no right to a jury trial at the dispositional phase. *In re Miller*, 178 Mich App 684, 686; 445 NW2d 168 (1989). At a preliminary hearing in a child protective proceeding, the trial court is required to "advise the respondent of the right to trial on the allegations in the petition and that the trial may be before a referee unless a demand for a jury or judge is filed pursuant to MCR 3.911 or 3.912." MCR 3.965(B)(6). In this case, the record of the preliminary hearing discloses that the trial court advised respondent of his rights to a court-appointed attorney and to a trial by jury. Thus, the court fully complied with MCR 3.965(B)(6).

MCR 2.508-2.516 governs jury procedures in child protective proceedings, except as otherwise provided in MCR 3.911(C)(2). MCR 3.911(C); *In re Whittaker*, 239 Mich App 26, 29; 607 NW2d 387 (1999). MCR 2.508(D) addresses waivers or withdrawals of jury demands. It provides:

> **(D) Waiver; Withdrawal.**
>
> (1) A party who fails to file a demand or pay the jury fee as required by this rule waives trial by jury.

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phase, with respondent's consent.

[2] Relying on *In re Hatcher*, 443 Mich 426, 439-444; 505 NW2d 834 (1993), petitioner argues that this Court lacks jurisdiction to consider any issues related to the adjudicative phase because respondent did not file a direct appeal from the adjudicative order. We disagree. Respondent's parental rights were terminated at the initial dispositional hearing. Thus, the order terminating respondent's parental rights was the first order from which an appeal by right was available. MCR 3.993(A); see also *In re Bechard*, 211 Mich App 155, 159-160; 535 NW2d 220 (1995).

> (2) Waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence stated, or attempted to be stated, in the original pleading.
>
> (3) A demand for trial by jury may not be withdrawn without the consent, expressed in writing or on the record, of the parties or their attorneys.

Unlike in a criminal matter, where the court must address the defendant personally on the record and ascertain that the defendant understands his right to a jury trial and voluntarily chooses to give up that right, MCR 6.402(B), there is no requirement in child protective proceedings that a party withdraw a request for a jury trial on the record, or that the trial court ensure that such withdrawal is knowingly and voluntarily made. *Whittaker, supra* at 29-30; MCL 712A.1(2), MCR 2.508(D)(3). Rather, under MCR 2.508(D)(3), an attorney may withdraw a respondent's demand for a jury trial in a child protective proceeding. See *Whittaker, supra* at 29-30 (in delinquency proceedings, MCR 2.510-2.516 and former MCR 5.911(C) [now MCR 3.911(C)] allow an attorney to waive his client's right to a jury trial).

Respondent argues that the trial court erred in denying his motion for reconsideration of his withdrawal of his jury demand and consent to a bench trial, because respondent was not made aware that Edwards had a continuing duty to represent him throughout these proceedings, despite the existence of potential scheduling conflicts. Absent that knowledge, respondent asserts that he waived his jury demand without proper advice or counsel. However, the trial court informed respondent of his right to a jury trial at the preliminary hearing, as required by MCR 3.965(B)(6) and respondent admits that he understood that, having made a jury demand, he had a right to a jury trial. Respondent also understood that at a jury trial, the determination whether grounds for jurisdiction were established would be decided by a panel of his peers, while at a bench trial that determination would be made by the judge. And respondent acknowledged that Edwards advised him that it would be better for respondent to have a jury trial. Despite that advice, respondent elected, for strategic reasons, to waive his request for a jury trial and go forward with a bench trial to ensure that Edwards could continue as his counsel. Respondent offers this Court no authority in support of his position that Edwards had a continuing duty to represent him throughout a jury trial, regardless of any scheduling conflicts, or for his suggestion that the trial court had an obligation to advise respondent that Edwards had such a duty. The trial court complied with all procedural requirements relative to respondent's jury demand. Therefore, the trial court properly accepted respondent's withdrawal of his jury demand and consent to a bench trial.[3]

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[3] Furthermore, we note generally that by participating fully in the bench trial without objection, respondent affirmatively waived any claim of error based on the lack of a jury trial. *Marshall Lasser, PC v George*, 252 Mich App 104, 108-109; 651 NW2d 158 (2002). In *Marshall Lasser*, this Court held that a party's full and active participation without objection or protest in a bench trial constitutes an unequivocal waiver of a jury demand. *Id.* at 109. This Court explained that:

> [The p]laintiff [having participated fully in the bench trial] cannot now be heard to complain about the lack of a jury trial . . . when by its own unequivocal conduct it waived this right. This is also in keeping with our longstanding rule against

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Respondent alternatively argues that Edwards was ineffective for advising him that, due to Edward's potential scheduling conflict, he could continue to represent respondent only if respondent agreed to proceed with a bench trial, and that if respondent desired a jury trial, he would need to obtain a new court-appointed attorney.

This Court has applied the test for ineffective assistance of counsel in criminal matters to termination proceedings even though the right to counsel in child protective proceedings is statutory, not constitutional. *In re AMB*, 248 Mich App 144, 221-222; 640 NW2d 262 (2001); *In re Rogers*, 160 Mich App 500, 502; 409 NW2d 486 (1987). To establish ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the respondent that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 309, 338; 521 NW2d 797 (1994). He must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, he must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

At the pretrial conference two weeks before the scheduled trial date, the parties advised the court that they believed it would take three days to try this matter at the adjudicative phase. Edwards then advised the trial court that he had a potential scheduling conflict in that he was scheduled to begin a civil trial in another court the day after the adjudicative trial was scheduled to begin in the instant case. The trial court indicated that, given the nature of the case, it would not permit the parties to begin a jury trial on a Monday, as scheduled, and then continue it the following week, should more than one day be needed for the instant matter and Edwards' other trial proceed as scheduled. The trial court also explained that, given juror availability, any adjournment of the instant proceedings necessarily would be substantial, which would not be fair to the parties or the minor child. Edwards advised that he did not expect that he could get an adjournment of his other trial. The trial court, explaining that it believed that that this matter took precedent over Edwards' other civil matter, offered to speak with the presiding judge in that matter regarding an adjournment should Edwards wish it to do so. Thereafter, respondent withdrew his request for a jury trial and consented to a bench trial.

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> harboring error as an appellate parachute. Further, it would simply be unfair to allow a party to make a demand for a jury trial, participate without objection in a bench trial, and then attempt to overturn the results by claiming error based on the jury demand. [*Id.*]

The same is true here. Respondent affirmatively waived his jury demand and fully and actively participated in the bench trial without objection or protest. The result being other than he hoped for, he may not now claim that the failure to hold a jury trial was error. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 54; 698 NW2d 900 (2005); *Marshall Lasser, supra* at 109.

As noted above, respondent acknowledged at the hearing on his motion for reconsideration that he understood that he had a right to a jury trial and that a jury trial was a trial by a jury of his peers, while a bench trial was held before the judge. Respondent could not recall whether Edwards explained the respective advantages and disadvantages of a jury trial and a bench trial, but he acknowledged that Edwards did explain that it would be preferable for respondent to have a jury trial. Respondent advised the court that he believed that he had to choose between consenting to a bench trial to ensure Edwards' continued representation, or continuing with the scheduled jury trial, risking that Edwards would become unavailable. Thus, respondent elected, for strategic reasons, to waive his request for a jury trial and go forward with a bench trial to ensure that Edwards could continue as his counsel.

Respondent argues that Edwards' advice that he would need to consent to a bench trial for Edwards to continue to represent him was not consistent with Edwards' duty to represent respondent throughout these proceedings despite any potential scheduling conflicts. However, respondent admitted that Edwards was representing him pro bono, and that Edwards explained that he had a potential scheduling conflict because he was scheduled to appear at another trial for four days beginning the day after the jury trial was scheduled to begin in this case and that he could not afford to give up representation of his paying client for financial reasons. Although respondent argues that Edwards had an absolute obligation to represent him at the jury trial in this matter, MRPC 1.16(b)(5) provides that a lawyer may withdraw from representing a client if the representation will result in an unreasonable financial burden on the lawyer. Thus, MRPC 1.16(b)(5) provided a basis for Edwards to file a motion to withdraw as respondent's attorney if respondent declined to waive a jury trial. Accordingly, we do not view counsel's advice as improper. Further, Edwards' advice protected respondent's right to a jury trial by ensuring that respondent was aware of his right to a jury trial and also aware that he could still proceed with a jury trial if he wanted, albeit with new court-appointed counsel. Edwards advised respondent that a jury trial was preferable to a bench trial. Despite this advice, however, respondent made the strategic decision to consent to a bench trial to ensure Edwards' continued participation as his counsel, rather than risk the possibility that Edwards would be unable to continue, leaving respondent to proceed with appointed counsel.

Additionally, for the court to assume jurisdiction over the minor at the adjudicative phase, the allegations of a petition only need be established by a preponderance of the evidence. MCR 3.972(C)(1); MCR 3.977(E)(2); *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). Petitioner alleged that respondent caused physical injury to, and physically abused, the minor child. Respondent admitted that he caused the minor child to suffer a broken leg, but he testified that the injury occurred accidentally. However, the child's treating physician testified that, while not impossible, it was unlikely that either the child's broken leg or bruises on the child's face were caused in the accidental manner described by respondent. Given this evidence, respondent has not established a reasonable probability that, but for his counsel's alleged error, the result of the proceedings would have been different. Therefore, respondent has not established that he received ineffective assistance of counsel at the adjudicative phase of these proceedings.

We affirm.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra